IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

AMOS MARTIN AND TAMMY MARTIN, HIS SPOUSE,

Petitioners,

v. **No. 090630**

THE HONORABLE JAMES STUCKY,
Judge of the Circuit Court of Kanawha County,
West Virginia, and BASSAM HAFFAR, M.D.,

RESPONDENTS.

RESPONSE OF BASSAM HAFFAR, M.D. TO PETITIONERS' REQUEST FOR WRIT OF PROHIBITION

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I. INTRODUCTION

COMES NOW the Respondent, Bassam Haffar, M.D., by counsel, and, in response to Petitioner's Writ Seeking Order of Prohibition, responds as follows: (1) the factors which give rise to the issuance of a Writ of Prohibition do not exist in this matter because, *inter alia*, the trial court's order was not clearly erroneous as a matter of law and thus it did not exceed its legitimate powers, and (2) the Order entered by the Court allowing the Respondent to file a Third-Party Complaint against the Cleveland Clinic and move the trial date of April 20, 2009 was reasonable and in accordance with established rules and procedures under the *West Virginia Rules of Civil Procedure* and extant case law. As discussed *infra*, the April 20, 2009 trial date was highly unlikely to proceed because of many cases ahead of it on the docket and the substantial discovery that remained, including six expert depositions and several fact witness depositions. Also, Petitioners' own experts held opinions that the Cleveland Clinic deviated from the standard of care. This evidence was adduced during the depositions of these experts, as their opinions as to the Cleveland Clinic were not included in their expert disclosures. Just as Petitioners have the right to file an

action against an alleged negligent party, West Virginia law likewise allows this Respondent to file a third-party complaint against another alleged tortfeasor, if that tortfeasor is not joined in the litigation once it becomes clear that the third-party should be joined. It is well settled that such an action is a requirement during the pendency of the action, not an option to be exercised after a civil action is settled or tried to a verdict.

This case does not present a unique factual scenario which would supply this Court with an adequate basis to issue a show cause order relating to the Petition filed herein. Rather, a review of the procedural posture of this case demonstrates that Respondent had an adequate basis to move for leave to file a third-party complaint, when the trial date of April 20, 2009 was highly unlikely to proceed and it became clear that the third party should be added after the depositions of Petitioners' experts.

II. FACTS

The original Complaint in this matter was filed on June 27, 2008. The Scheduling Order, entered September 24, 2008, set a trial date per agreement of the parties on April 20, 2009, less than ten months from the date of filing of the Complaint. The parties agreed to such a short time frame due to the metastatic disease from which the Petitioner, Amos Martin, is suffering.

During the course of discovery, in October and November of 2008, the depositions of Mr. and Mrs. Martin and Dr. Haffar were taken. Another witness, Debbie Quintrell (Dr. Haffar's office manager) was also taken. On December 15, 2008, Petitioners disclosed their expert witnesses. On January 20, 2009, this Respondent's experts were disclosed.[1] However, because of difficulties in Petitioners' counsel's schedule, the depositions of Petitioners' experts were not scheduled until mid February 2009 and late March of 2009. It was during the depositions of these experts in late March

[1] An extension of time to disclose experts was agreed upon by all counsel of record.

of 2009 that testimony was adduced critical of the Cleveland Clinic because certain physicians caring for Mr. Martin failed to follow-up on a suspicious CT scan dated October 13, 2005 showing questionable lesions in both the liver and lungs of Mr. Martin and laboratory studies demonstrating residual cancer in Mr. Martin's body. The day after this CT scan was performed, Mr. Martin underwent removal of a rectal tumor; this tumor was discovered by Dr. Haffar in September of 2005, and Dr. Haffar immediately referred Mr. Martin to the Cleveland Clinic for treatment. He continued to be followed by doctors at the colorectal department at the Cleveland Clinic.

Mr. Martin underwent another surgery in January of 2006 at the Cleveland Clinic for reversal of an ileostomy. On January 10, 2006, certain blood work was ordered for Mr. Martin, including a CEA (carcinoembryonic antigen) level. Elevations of a cancer patient's CEA can be indicative of the spread of cancer and active cancerous lesions in the body. Despite the removal of his rectal tumor in October of 2005, Mr. Martin's CEA level was above normal limits (which are typically in the range of 0 to 2.3). Mr. Martin's CEA level was 3.1 on January 10, 2006. During his last visit to Cleveland Clinic on May 3, 2006, another CEA was taken; his CEA level increased to 4.4.

Despite the increasing CEA levels and the suspicious CT scan which recommended follow-up, no physician at the Cleveland Clinic recommended a follow-up CT scan for Mr. Martin. Rather, his last office visit at the Cleveland Clinic recommended another CEA level and the performance of a colonoscopy. For these reasons, Mr. Martin went to Dr. Haffar for follow-up examination via colonoscopy. Dr. Haffar performed a colonoscopy, which showed no problems, and also ordered a CT scan, which was performed on July 31, 2006. The CT scan showed multiple lesions in the liver.

It is important to note that Dr. Haffar had no communication with the Cleveland Clinic. He received no telephone calls or other data from the Cleveland Clinic at any time, until October of 2007 when Dr. Haffar himself requested records from the Cleveland Clinic. Dr. Haffar chose, on

his own accord, to request a CT scan for Mr. Martin, which was performed on July 31, 2006. As Dr. Haffar testified in his deposition, he was surprised that Mr. Martin did not receive chemotherapy or radiation treatment prior to or shortly after his surgery in October of 2005. (See excerpt of Dr. Haffar's deposition, pg. 50, attached hereto as "Exhibit A".) It was the only reason that Dr. Haffar ordered the CT scan; he was not advised by Mr. Martin or any physician's at the Cleveland Clinic to do so.

The CT scan showed signs of metastatic disease in the liver of Mr. Martin. Because Mr. Martin worked at the South Charleston Stamping Plant (which is next door to Dr. Haffar's office), Mr. Martin would occasionally come to Dr. Haffar's office without an appointment to have insurance forms completed, have work excuses signed, etc. According to Dr. Haffar and his office manager (Debbie Quintrell), Mr. Martin came to Dr. Haffar's office sometime in mid August of 2006 to check on the results of his CT scan. It is undisputed that Dr. Haffar received the CT scan report and asked his office to contact Mr. Martin to come to his office, but before they had an opportunity to schedule a visit, Mr. Martin arrived unannounced. According to Dr. Haffar and Ms. Quintrell, Dr. Haffar told Mr. Martin that the cancer may have spread to his liver and that he needed to return to the Cleveland Clinic for further follow-up treatment because he was a current patient at the Cleveland Clinic. Because the chart had not been pulled for an entry at that time, Dr. Haffar forgot to have the chart pulled after Mr. Martin left the office to document this conversation. According to Mr. Martin, this discussion never occurred; therefore, he never followed up with further treatment until October of 2007.

When Mr. Martin returned to Dr. Haffar's office by referral of Dr. Sheikh (Mr. Martin's family practice/allergy physician), Dr. Haffar immediately requested records from the Cleveland Clinic, which he received in late October of 2007. When he was deposed in October of 2008, Dr. Haffar testified that he was "concerned" that Mr. Martin did not get radiation or chemotherapy

following his initial treatment at the Cleveland Clinic. (See Exhibit A.)

During the course of discovery, counsel for Dr. Haffar consulted with James Stark, M.D. to serve as an expert. Dr. Stark is an oncologist practicing in Virginia and is board certified in internal medicine and hematology/oncology. During the discussion of the case with Dr. Stark in late November/early December of 2008, he was asked whether failure to give radiation or chemotherapy to Mr. Martin by the Cleveland Clinic was a deviation from the standard of care. Dr. Stark believed it was not a deviation, and that the standard of care does not require patients like Mr. Martin who have a single cancerous lesion in the colon or rectum to undergo chemotherapy or radiation. At this point, it was apparent that there was no deviation from the standard of care by the Cleveland Clinic, at least based on this theory of liability.

However, it appeared that the records received by Dr. Haffar from the Cleveland Clinic were not complete. Thus, in November of 2008, counsel for Dr. Haffar sent a medical authorization signed by Mr. Martin to the Cleveland Clinic seeking a complete copy of their chart. The Cleveland Clinic complied with the request and sent the chart of Mr. Martin to Dr. Haffar's counsel in early December of 2008.

In the intervening weeks, the parties agreed to begin scheduling depositions of experts. Petitioners' surgical oncologist's deposition was taken on February 17, 2009. In preparation for that deposition, it was clear from the review of the chart that no additional CT studies had been ordered at the Cleveland Clinic. In late February of 2009, counsel for Dr. Haffar, conferred with a nursing expert to assess a life care plan that was previously disclosed by Petitioners. During the course of that assessment, this expert (Kathleen Kuntz, RN) noted that the higher CEA levels and the lack of follow up as to the October 13, 2005 CT scan may be of concern and suggested that these issues be raised with Petitioners' experts, as well as the medical defense experts.

On March 20, 2009, the deposition of Plaintiff's treating oncologist and designated expert,

Dr. Jogenpally, was taken at his offices in South Charleston, West Virginia. During his deposition, Dr. Jogenpally testified as follows:

Q. **And you would expect physicians at the Cleveland Clinic to follow through with some kind of examination or radiographic studies for follow-up on that [i.e., the October 13, 2005 CT scan at the Cleveland Clinic], do you not?**

A. **Yes. Someone has to be, yes.**

Q. **Then you would agree it would be a deviation from the standard of care not to do that, correct?**

Mr. Wilt: **Objection.**

The Witness: **We expect somebody to follow-up on this, yes.**

(See excerpt of deposition of Dr. Jogenpally, "Exhibit B", pg. 45.)

Additionally, Dr. Jogenpally testified in his deposition that he had only reviewed the Cleveland Clinic records (which had been in his file for more than one year) "yesterday or the day before yesterday," i.e., on March 18th or 19th, 2009. Although the Cleveland Clinic records (including a report of the CT scan) had been in Dr. Jogenpally's chart for some time, he had never taken the opportunity to review them until he was preparing for his deposition. (See "Exhibit C," deposition of Dr. Jogenpally, pg. 41.) Clearly, despite having these records in his chart for more than one year, and having been disclosed as an expert by Petitioners in his capacity as treating oncologist for Mr. Martin, Dr. Jogenpally did not review these documents until he was preparing for his deposition on March 20, 2009. Thus, Petitioners' own treating physician and designated expert testified during his deposition on March 20, 2009 (exactly one month prior to trial) that he believed that the Cleveland Clinic deviated from the standard of care in failing to follow through with the CT scan of Mr. Martin performed on October 13, 2005.

Additionally, Petitioners retained expert oncologist, Daniel Leheru, M.D., a physician at John Hopkins Medical Center, testified that the Cleveland Clinic physicians deviated from the

standard of care by failing to make any follow up recommendations regarding CT scan from October 13, 2005, but also in failing to appreciate the significance of Mr. Martin's rise in his CEA levels. Dr. Leheru testified:

Q. If this is from the Cleveland Clinic and Mr. Martin was a patient on May 2, 2006, and they have a prior CT scan that shows questionable abnormalities in his liver and lungs and a CEA level of 4.4, if you were treating Mr. Martin, you would have ordered a CT scan at this point, would you not?

A. Yes. I would.

Q. And the standard of care would require that, particularly in light of this CEA level, which is 4.4, doesn't it?

A. I would say that, that a marker such as this would, would make me consider a CT scan within, within a shorter period of time, that would be correct.

(See excerpt of Deposition of Dr. Leheru, "Exhibit D," pg. 47.)

Finally, on March 31, 2009, the Defendant's oncology expert, James Stark, M.D., was deposed. He was questioned as follows by Respondent's counsel near the end of his deposition about the Cleveland Clinic's role in the care of Mr. Martin:

Q: Dr. Stark, with respect to the Cleveland Clinic, you have previously testified that you believe that their failure to follow-up on the CT scan of October 13, 2005, along with the increasing CEA levels from January and May of 2006 were deviations from the standard of care; correct?

A: Yes.

Q: Would it likewise be reasonable to assume that physicians at the Cleveland Clinic attending to Mr. Martin in that time frame, had they met the standard of care, would have ordered a CT scan of his liver and lungs to follow-up on those organs systems?

A: Yes.

Q: Had they done that in - -some time frame between April and May of

2006, do you believe, based on the information you have reviewed thus far in this case, that the CT scans at the Cleveland Clinic--of the liver--would have shown signs of metastatic disease as seen on the July 31, 2006, CT scan?

A: Yes.

Q: **And it is reasonable to assume that had a CT scan been done at the Cleveland Clinic during that time frame, that the physicians would have referred Mr. Martin for oncologic treatment at the clinic?**

A: **Or somewhere, yes.**

Q: **Or some other facility; correct?**

A: **Yes, closer to home, or if they wanted to do it there or he wanted to stay there, yes.**

(See excerpt of Dr. Stark's deposition, "Exhibit E," pgs. 75-76.)

Dr. Jogenpally's deposition was taken on March 20, 2009; Dr. Leheru's deposition was taken March 24, 2009; this Respondent filed his Motion for Leave to File a Third-Party Complaint on March 25, 2009, the day after Dr. Leheru's deposition and five days after Dr. Jogenpally's deposition. A hearing was scheduled for April 8, 2009.

As of the date of the hearing on Defendant's Motion for Leave to File a Third-Party Complaint (on April 8, 2009), this matter was twelfth on the Court's trial docket. Eight criminal cases and three civil cases preceded it. (See excerpt of April 8, 2009 hearing transcript, "Exhibit F," pg. 14.) Judge Stucky noted this case was "probably in jeopardy" of a trial continuance as it existed on April 8, 2009 because of its depth in the docket and the fact that, even if none of the criminal cases were scheduled to go to trial, a civil case ahead of this trial was an older case and was ready to proceed to trial. (*Id.*)

As of April 8, 2009, at least five expert depositions still needed to be completed, as well as several fact witness depositions. It was highly unlikely that the April 20, 2009 trial date would proceed. Additionally, even if the Motion for Leave to File a Third-Party Complaint had been filed

in late October or early November of 2008, it is highly likely the April 20, 2009 trial date would have been continued because of the time frame for the notice of claim and screening certificate of merit to be sent to the Cleveland Clinic, for the Cleveland Clinic to respond to the notice of claim, and for the filing of the Third Party Complaint and the Answer thereto. In other words, no matter what the circumstances, the April 20, 2009 trial date was simply not viable under any condition. To argue that prejudice inured to the Petitioners because the filing of this third party action is without merit. The legal foundation for the filing of the third-party complaint is well supported by recent West Virginia case law as well as the *West Virginia Rules of Civil Procedure.*

III. ARGUMENT

A. RULE 14 OF THE *WEST VIRGINIA RULES OF CIVIL PROCEDURE*, *HOWELL V. LUCKEY*, 205 W.Va. 445, 518 S.E.2d 873 (1999), AND *LEUNG V. SANDERS*, 213 W.Va. 569, 584 S.E.2d 203 (2003) SUPPORT THE TRIAL COURT'S DECISION ALLOWING RESPONDENT TO FILE A THIRD-PARTY CLAIM

Based on the testimony of Drs. Jogenpally, Leheru and Stark, it is clear that the Respondent was entitled to file a third-party claim in order to bring all potential tortfeasors into one civil action. Indeed, under West Virginia law, "[a] defendant may not pursue a separate cause of action against a joint tortfeasor for contribution after judgment has been rendered in the underlying case, when the joint tortfeasor was not a party in the underlying case and the defendant did not file a third-party claim pursuant to Rule 14(a) of the *West Virginia Rules of Civil Procedure*." *Howell v. Luckey*, Syl. Pt. 5, 205 W. Va. 445, 518 S.E.2d 873 (1999).[2] In *Howell,* this Court noted that the right of contribution serves the purpose of "moderating the inequity that results when a plaintiff casts the

[2] Rule 14(a) of the West Virginia Rules of Civil Procedure states in part that "[a]t any time after the commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff."

entire responsibility for an incident or accident on one of several joint tortfeasors by deciding to sue only one of the tortfeasors." *Howell,* 205 W.Va. at 448 (citing *Sydenstricker v. Unipunch Products, Inc.*, Syl. Pt. 5, 169 W. Va. 440, 288 S.E.2d 511 (1982)).

Furthermore, third-party practice should be freely granted where the facts and circumstances dictate because the fundamental purpose of contribution "is to enable all parties who have contributed to the plaintiff's injuries to be brought into one suit. Not only is judicial economy served, but such a procedure also furthers one of the primary goals of any system of justice – to avoid piecemeal litigation which cultivates a multiplicity of suits and often results in disparate and unjust verdicts." *Howell*, 205 W. Va. at 449 (citing *Board of Education of McDowell County v. Zando, Martin & Milstead, Inc.,* 182 W. Va. 597, 603-604, 390 S.E.2d 796, 802-803 (1990)).

Respondent refers this Court to the case *Leung v. Sanders*, 213 W. Va. 569, 584 S.E.2d 203 (2003), which raised similar issues to those herein. An analysis of the facts, circumstances and holdings in the *Leung* provides significant guidance to this Court as to the relief sought by Petitioner in the underlying action.

Leung was a medical professional liability action in which the complaint was filed on February 22, 2002. *Leung*, 213 W. Va. at 572. The trial court entered a scheduling order on August 5, 2002, setting a May 20, 2003 trial date, but did not include a time limit to join other parties. *Id.* On March 21, 2003 (less than two months before trial), Dr. Leung filed a Motion for Leave to File a Third-Party Complaint against a Dr. Wanger and another entity. Importantly, the motion alleged that Dr. Leung and Dr. Wanger had an agreement whereby Dr. Wanger would provide medical care to Dr. Leung's patients when Dr. Leung was unavailable. *Id.* It also alleged that Dr. Wanger provided some form of medical treatment to the Plaintiff. *Id.* Dr. Leung alleged that, if he would be found liable, then all or some of the liability would be the result of Dr. Wanger's negligence. *Id.* Notably, not all discovery was complete at the time of this filing.

The Circuit Court refused permission to file the third-party complaint, noting that it was filed two months before the trial date, failed to contain any allegations of negligence against Dr. Wanger, and failed to comply with the screening requirements of the West Virginia Medical Professional Liability Act. *Id.* at 573. Dr. Leung filed a writ of prohibition. The Supreme Court of Appeals granted Dr. Leung's writ.

In analyzing the factors for allowing Dr. Leung to file a third-party complaint, this Court noted that the timeliness of the motion to file the third-party complaint is analyzed under Rule 14 of the *West Virginia Rules of Civil Procedure*. This Court further noted that no deadline to file a third-party complaint was contained in the scheduling order, but was not persuaded that this factor provided the basis for the Petitioner's argument. Rather, the Court said it must "take the facts as they actually existed and proceed upon the recognition that [the] deadline governing the joining of additional parties was included in the Scheduling Order in this case." *Id.* at 574. The Court went on to assert that "the proper approach is to examine the issue under *West Virginia Rule of Civil Procedure* 14," which "'lays out the guidelines under which Defendants and Plaintiffs may bring third parties into the action.'" *Id.* (citations omitted). In so doing, the Court noted that a party must file leave to bring in a third-party defendant unless the Motion is made within ten days of service of the moving party's answer. *Id.*

Applying these criteria to the *Leung* facts, the Court noted that Dr. Leung's counsel properly sought leave of court to file the third-party complaint, but found that the circuit court abused its discretion because discovery in the case was still ongoing that there was a distinct likelihood that the trial would be continued. *Id.* at 576. The Court cited to federal authority, noting that "normally, a 'party must not be dilatory in proceeding...after a basis for impleader *becomes clear.*'" *Id.* at 575 (citing *Moore's Federal Practice* §14.21 (2003)) (emphasis supplied). The *Leung* Court further noted that some delay in third-party practice may be inevitable and that "there is nothing talismanic

about delay alone." *Id.* The analysis, according to the Court, must be "if the reason for the delay is excusable and analyze any resulting prejudice." *Id.* In conducting such an analysis, the *Leung* Court concluded that the third-party complaint was indeed appropriate and, despite being filed approximately thirteen months after the filing of the complaint, allowed for the addition of the third-party defendant.

The key phrase as to the time frame for a party to bring in a third-party defendant is when the basis for the third-party claim "becomes clear." In the pending matter, the basis for seeking to bring the Cleveland Clinic into this case "became clear" after the deposition of Plaintiffs' treating oncologist and designated expert, Dr. Jogenpally. This was taken on March 20, 2009. During his discovery deposition, Dr. Jogenpally was asked about his opinions based on the disclosure of him as an expert witness and his treatment of Mr. Martin, as well as his opinions as to Mr. Martin's overall condition. Importantly, nothing in the disclosure in any way indicated that Dr. Jogenpally would be critical of any other party in this case. However, in reviewing his chart, it is clear that Dr. Jogenpally had various records from the Cleveland Clinic, which he admitted he had not reviewed in full until approximately one day before his deposition. (See Exhibit C.) Thus, it was only on the day before his deposition that Dr. Jogenpally, a disclosed expert for Petitioners, reviewed the records in full from the Cleveland Clinic and rendered an opinion that the Cleveland Clinic deviated from the standard of care.

As noted *supra*, Petitioners' other oncology expert, Dr. Laheru, was deposed only four days after Dr. Jogenpally; he likewise rendered testimony critical of the Cleveland Clinic. A day later, on March 25, 2008, Respondent filed his Motion for Leave to File Third-Party Complaint. A supplemental brief was filed by Respondent on April 6, 2009; the hearing was held before Judge Stucky on April 8, 2009. This Respondent timely moved for leave to file his third-party complaint.

B. PETITIONERS' RELIANCE ON *SHAMBLIN V. NATIONWIDE MUTUAL INS. CO.*, 183 W.Va. 585, 396 S.E.2d 766 (1990) IS MISPLACED BECAUSE THAT CASE IS FACTUALLY DISTINCT FROM THE PRESENT MATTER

Petitioners have argued that under *Shamblin v. Nationwide Mutual Ins. Co.*, 183 W. Va. 585, 396 S.E.2d 766 (1990), the trial court should not have allowed Dr. Haffar to bring in a third-party because Petitioners will be prejudiced, as Mr. Martin might not live to see his case to trial. However, *Shamblin* is factually distinctive from this case.

In *Shamblin*, the plaintiff brought suit against the defendant, Nationwide Mutual Insurance Company (hereinafter "Nationwide"), to recover an excess verdict against him in a previous lawsuit as a result of Nationwide's refusal to settle a liability claim against the plaintiff within his policy limits. 183 W. Va. at 587. Nationwide sought leave of court to file a third-party action against the plaintiff's personal counsel, alleging that plaintiff's counsel breached their duty to protect the plaintiff from the excess exposure by refusing to accept settlement offers within the policy limits. The trial court denied the defendant's motion for leave and refused to allow Nationwide to file the third-party complaint against plaintiff's personal counsel. *Id.* at 597. Nationwide appealed the trial court's ruling.[3]

On appeal, the West Virginia Supreme Court of Appeals noted that West Virginia Rule of Civil Procedure 14(a) provides that a defending party may, as third-party plaintiff, file a complaint upon a person who is not a party to the action who may be liable to the third-party plaintiff for all or

[3] After a verdict was returned in favor of the plaintiff, Nationwide appealed, alleging several errors by the trial court: (1) the trial court erred by allowing recovery of punitive damages; (2) the trial court erred by adopting negligence as the sole standard to determine whether liability insurer has complied with its duty to its insured regarding the settlement of third-party claims; (3) the trial court erred by failing to grant summary judgment in favor of Nationwide and failing to direct a verdict in favor of Nationwide at the close of the plaintiff's case-in-chief; (4) the trial court erred by not allowing Nationwide to bring the third-party action; (5) the trial court erred by permitting the introduction of a page of Nationwide's claims manual as rebuttal evidence; (6) the trial court erred by failing to grant Nationwide's motion in limine on appeal issue; and (7) the trial court erred by continually interjecting itself into the trial with ponderous cross-examination and opinions as to witnesses. 183 W. Va. at 588. The West Virginia Supreme Court of Appeals found that error was committed on the issue of punitive damages, but found no errors as to the other issues raised by Nationwide. *Id.*

part of the plaintiff's claims against him. *Id.* The Court stated that it is within the sound discretion of the trial court to allow such third-party procedure.[4] *Id.*

However, the Court noted that where "the third-party procedure may create confusion or cause complicated litigation involving separate and distinct issues the trial court does not abuse its discretion in refusing to allow impleader under third-party practice." *Id.* (citing *Bluefield Sash & Door Co. Inc. v. Corte Construction Co.*, 158 W. Va. 802, 216 S.E.2d 216, Syl. Pt. 5, in part, (1975) (overruled on other grounds by *Haynes v. City of Nitro*, 161 W. Va. 230, 240 S.E.2d 544 (1977)). In addition, the Court found that "a trial court should not allow impleader under [Rule 14] if there is a possibility of prejudice to the original plaintiff or third party defendant." *Id.* (citing *Bluefield Sash* at Syl. Pt. 3, in part.)

Ultimately, the West Virginia Supreme Court of Appeals found no abuse of discretion in the trial court's decision to deny Nationwide's motion to file a third-party complaint. *Id.* The Court, basing its decision on the specific facts of the case, found that allowing the third-party action would create "a strong possibility of confusion of the issues since the third-party complaint was essentially based on legal malpractice and the underlying action was a bad faith insurance claim." *Id.* at 598. Further, the Court agreed with the plaintiff's argument that the third-party action was merely a delay tactic, as the motion was made two months prior to trial, more than four years after the filing of the lawsuit and two and one-half years after Nationwide first mentioned the possibility of bringing a third-party claim. *Id.* at 597-598. The Court stated that "the unexplained delay in filing the motion for leave until shortly prior to trial would have prejudiced the plaintiff had it been granted." *Id.* at 597. Finally, the Court reasoned that there was nothing precluding Nationwide for filing a separate action for indemnification and/or contribution. *Id.* at 598.

In *Shamblin*, this Court based its decision in part on its holding in *Bluefield Sash*, *supra*. In

[4] *Shamblin* was decided before *Howell*, discussed *supra*, which prohibits such post verdict claims.

Bluefield Sash, the plaintiff filed suit against the defendant, claiming that the defendant was negligent in the construction of a low income housing project adjoining the plaintiff's property, causing damage to the property. The defendant, the Housing Authority of the City of Bluefield, sought to bring the architecture corporation in as a third-party defendant, claiming that it had a contract claim against the architecture corporation for breach of warranty. *Id.* at 803-804.

This Court found that the trial court did not abuse its discretion in dismissing the defendant's third-party complaint, because plaintiff's negligent construction claim was different from the third-party plaintiff's breach of warranty claim. The Court stated that:

> It has been held that there is no reason for the court to permit impleader if it would require the trial of issues not raised by the controversy between the plaintiff and defendant, or where there is a lack of similarity between the issues and evidence required to prove the main and third party claims.

158 W. Va. at 805 (internal citations omitted). Thus, the West Virginia Supreme Court of Appeals held that:

> [T]he causes of action between the plaintiff and defendant and the third party plaintiff and the third party defendant are not the same and the issues are different. To allow impleader in such case would tend for confusion if tried together and may prejudice the plaintiff and inconvenience the third party defendant.

Id. at 806.

This case is factually different from the *Shamblin* and *Bluefield Sash* cases. In *Shamblin*, the Court found that there was a risk of confusion of the issues because the third-party action, which was based on legal malpractice claims, was not materially related to the underlying bad faith insurance claim. Likewise, in *Bluefield Sash*, the Court found that there was a risk of confusion of the issues because the plaintiff's negligent construction claim was not based on the same issues as the third-party plaintiff's breach of warranty claim. In this case, the third-party claim against the Cleveland Clinic is a medical liability claim, which is based on the same facts and issues (Mr. Martin's cancer diagnosis) as the medical malpractice claim against Dr. Haffar. This Respondent's

actions were based on the same continuum of care as the claim as the actions of the physicians at the Cleveland Clinic. Therefore, there is not a risk of confusion of the issues in this case because the issues – whether Mr. Martin was provided appropriate follow-up care after diagnosis with colorectal cancer – in the underlying complaint and the third-party complaint are essentially the same.

Furthermore, in *Shamblin*, the Court found that the plaintiff would be prejudiced by allowing the third-party practice due to the "unexplained delay in filing the motion." *Id.* at 597. Here, there has been no delay in filing the third-party motion. Dr. Haffar's third-party complaint is based on the testimony of Dr. Jogenpally, Mr. Martin's treating physician, who was deposed on March 20, 2009, and Dr. Laheru, Petitioners' expert oncologist, who was deposed on March 24, 2009. Dr. Haffar's Motion for Leave to file the third-party complaint was filed on March 25, 2009, the day following Dr. Laheru's deposition. Therefore, there has not been any delay in filing the third-party claim.

A trial court's decision to allow a third-party complaint can only be overturned when the trial court exceeds its legitimate powers. Syl. Pt. 2, *State ex rel. Peacher v. Sencindiver*, 160 W. Va. 314, 233 S.E.2d 425 (1977). Petitioners cannot demonstrate that the trial court exceeded its legitimate powers by allowing Dr. Haffar to file the third-party complaint; in fact, given the holding in *Leung, supra*, and the broad parameters of Rule 14 of the *West Virginia Rules of Civil Procedure*, it is evident that Judge Stucky did not abuse his discretion in granting Respondent's motion. This Court has "long held that '[a] writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court." *Id.* Such standard requires that this Court find that Judge Stucky's order was more than an abuse of discretion.

Petitioners further cite to this Court's decision in *State ex rel. Thrasher Engineering v. Fox*, 218 W.Va. 134, 624 S.E.2d 481 (2005) in support of their petition. In *Thrasher*, this Court denied a

writ of prohibition sought by Petitioner because inclusion of the proposed third-party state agencies would, according to the trial court, "unduly complicate the litigation at hand...[and] has great potential to confuse the jury with additional and diverse issues..." (*Id.*, 218 W.Va. at 137.) This Court agreed with the trial court's decision, noting that the inclusion of the state agencies "would have resulted in further significant delay, prejudice, and confusion of the issues in litigation," including issues related to immunity of the state agencies.[5] The writ or prohibition was thus denied.

A consistent pattern emerges in the cases cited by Petitioners: this Court, in *Shamblin*, *Bluefield Sash* and *Thrasher* found that the respective trial courts did not exceed their legitimate powers in deciding the issues relating to the motions for leave to file third-party complaints. The hesitancy to overturn a trial court's decision in such cases is wholly consistent with the statutes and case law (discussed *infra*) which restricts such an extraordinary writ like prohibition to only those instances where a trial court exceeds its legitimate powers.

Finally, Petitioners argue that Mr. Martin's cancer is advanced, and he thus may not survive to testify at trial if the Cleveland Clinic is impleaded in the underlying action. In West Virginia, W. Va. Trial Court Rules 5.02 and 5.03 govern priorities of cases. Rule 5.02 states:

> In resolving scheduling conflicts the following priorities should ordinarily prevail: (a) appellate cases should prevail over trial cases; (b) criminal felony trials should prevail over civil trials; (c) cases in which the trial date has been first set (by published calendar, order or notice) should take precedence over cases which were set later; (d) trials should prevail over hearings, and hearings should prevail over conferences; and, (e) trials and hearings of a judge in travel status should prevail over trials and hearings of a judge sitting in residence.

Further, Rule 5.03 provides:

> In addition to the priorities set forth in TCR 5.02, consideration should be given to the following factors in the resolution of scheduling conflicts: (a) age of the cases and number of previous continuances; (b) whether sanctions for delay have been previously imposed; (c) the complexity of the cases; (d) the estimated trial time; (e)

[5] Additionally, this Court expressed concern over a fifteen month delay in bringing the third-party motion without any justification for such delay offered by the Petitioner. (*Id.*)

> the number of attorneys and parties involved; (f) whether the majority of parties and witnesses are local or will be summoned from outside the venue; (g) whether the trial involves a jury; (h) the difficulty or ease of rescheduling; and, (i) the existence of any constitutional or statutory provision granting priority to a particular type of litigation.

Nothing in Trial Court Rules 5.02 or 5.03 states that a severely ill plaintiff has a right to have his or her case heard more quickly than any other case. This Court, in its inherent rule-making powers, could have given priority to such a plaintiff when it developed the Trial Court Rules. However, the Court chose not to give such priority, perhaps because the West Virginia Wrongful Death Statute allows a decedent's personal representative to bring a cause of action for personal injuries following the decedent's death. *See* W. Va. Code §§ 55-7-8 and 55-7-8a. Moreover, Mr. Martin's trial testimony may be preserved via video. This is done in those instances when a party suffering a grave illness may not survive to the date of trial. Further, as part of the general charge typically given to juries throughout this State, the jury is instructed that it is to receive and consider video testimony of witnesses just as it would receive and consider that of witnesses appearing in person in the courtroom. The video testimony of witnesses via video is a common occurrence in trials throughout the State, and Mr. Martin's testimony may be preserved in this manner for trial if necessary.

C. PETITIONERS' REQUEST FOR THE EXTRAORDINARY WRIT OF PROHIBITION IS WITHOUT FOUNDATION AND SHOULD BE DENIED BECAUSE, *INTER ALIA*, JUDGE STUCKY DID NOT COMMIT A CLEAR ERROR OF LAW IN GRANTING THE RESPONDENT'S MOTION FOR LEAVE TO FILE THIRD-PARTY COMPLAINT

A trial court's decision to allow a third-party complaint to be filed can only be overturned

when the trial court exceeds its legitimate powers. *State ex rel. Peacher v. Sencindiver*, 160 W. Va. 314, 233 S.E.2d 425, Syl. Pt. 2 (1977). Petitioners cannot demonstrate that the trial court below exceeded its legitimate powers by allowing Dr. Haffar to file the third-party complaint, given the holding in *Leung, supra*, and the broad parameters of Rule 14 of the *West Virginia Rules of Civil Procedure*. Although evident that Judge Stucky did not abuse his discretion in granting this Respondent's motion, even such an abuse of discretion does not warrant the granting of a writ of prohibition. This Court has long held that "[a] writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court." *Id.* Thus, application of that standard requires that this Court find that Judge Stucky's order was more than an abuse of discretion. As the discussion *ante* demonstrates, Judge Stucky's Order rested on sound facts and law.

West Virginia Code §53-1-1 states that "the writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has not jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers." There is no dispute that the trial court has jurisdiction. The question is whether that court exceeded its legitimate powers in granting Respondent the opportunity to file a third-party complaint.

The standard to be applied for this analysis is found in Syllabus point 4 of *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996):

> In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

State ex rel. Hoover v. Berger, 199 W. Va. 12, 483 S.E.2d 12, Syl. Pt. 4 (1996).

Applying the facts and holdings of *Leung, supra*, to the trial court's order regarding leave to file the third-party complaint, it follows that the order was not "clearly erroneous as a matter of law" (the standard which must be weighed most heavily). Rather, the decision of the trial court was one vested well within its discretion, particularly when Petitioners' experts held opinions critical of the Cleveland Clinic and the likelihood of the April 20, 2009 trial date occurring was, at best, remote. Additionally, no law, rule, or regulation supports the contention that the dire health of one of the parties constitutes a sufficient basis for the trial to proceed despite a joint tortfeasor not being properly joined to the civil action. Should Mr. Martin pass away from his disease before the trial date of this case, the complaint may be amended to assert a wrongful death claim. Mr. Martin's testimony can also be preserved via video presentation. In short, Petitioner's claims will not result in any type of dismissal or diminution as the result of Judge Stucky's order; the order allows for an additional, necessary party to be joined in litigation in which the pending trial date of April 20, 2009 had a significant likelihood of continuance due to the trial court's docket and further significant discovery that needed to be conducted.

IV. CONCLUSION

Based on the foregoing, Respondent respectfully requests that this Court deny Petitioner's Writ of Prohibition and thus uphold the Order of Judge Stucky granting the underlying Defendant's Motion for Leave to File Third-Party Complaint.

BASSAM HAFFAR, M.D.

By Counsel

Mark A. Robinson (WV Bar ID #5954)
Amy Rothman (WV State Bar #10266)
FLAHERTY, SENSABAUGH & BONASSO, P.L.L.C.
200 Capitol Street
Post Office Box 3843
Charleston, West Virginia 25338-3843

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

AMOS MARTIN AND TAMMY MARTIN, HIS SPOUSE,

Petitioners,

v. **No. 090630**

THE HONORABLE JAMES STUCKY,
Judge of the Circuit Court of Kanawha County,
West Virginia, and BASSAM HAFFAR, M.D.,

RESPONDENTS.

CERTIFICATE OF SERVICE

I, Mark A. Robinson, do hereby certify that I have served the foregoing ***"RESPONSE OF BASSAM HAFFAR, M.D. TO PETITIONERS' REQUEST FOR WRIT OF PROHIBITION"*** upon the following counsel of record via hand delivery, this ____ day of May, 2009, addressed as follows:

Arden J. Curry, Esq.
Curry & Tolliver, PLLC
100 Kanawha Blvd, W.
Charleston, WV 25339

and by facsimile transmission as follows:

Ronald M. Wilt, Esq.
Dolt, Thompson, Shepherd, Kinney, & Wilt, PSC
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Charleston, West Virginia 25338-3843

CIRCUIT COURT OF KANAWHA COUNTY
WEST VIRGINIA

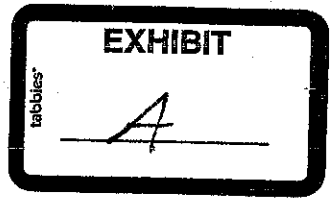
AMOS MARTIN and TAMMY MARTIN,
his spouse,

Plaintiffs,

vs. CIVIL ACTION NO. 08-C-1249

BASSAM HAFFAR, M.D.,

Defendant.



The deposition of BASSAM HAFFAR, M.D., taken upon oral examination, pursuant to notice and pursuant to the West Virginia Rules of Civil Procedure, before Tia G. Moseley, Registered Professional Reporter and Notary Public in and for the State of West Virginia, on Friday, October 10th, 2008, at 4:00 p.m., at the offices of Flaherty, Sensabaugh & Bonasso, PLLC, 200 Capitol Street, Charleston, West Virginia.

JACKSON & ASSOCIATES, INC.
606 VIRGINIA STREET EAST
CHARLESTON, WEST VIRGINIA 25301

(304) 346-8340

APPEARANCES

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On behalf of the Defendant:

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MARK A. ROBINSON, ESQ.
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Charleston, West Virginia 25301
(304) 345-0200

ALSO PRESENT:

TAMMY and AMOS MARTIN

EXAMINATION INDEX

EXHIBIT INDEX

MR. WILT: Swear in the witness, please.

BASSAM HAFFAR, M.D., called as a witness, after being first duly sworn by the Court Reporter/Notary Public, testified as follows, to-wit:

EXAMINATION

BY MR. WILT:

Q. Dr. Haffar, please tell me your full name.

A. Mohammad, M-O-H-M-A-D, Bassam, B-A-S-S-A-M, and last name Haffar, H-A-F-F-A-R.

Q. What's your date of birth?

A. January 20th, 1959.

Q. Dr. Haffar, have you ever given a deposition before?

A. Yes.

Q. On how many occasions?

A. Probably two occasions.

Q. What were the circumstances of why you happened to be giving a deposition?

A. We had a case before, another medical case.

Q. Was it in that case that you happened to

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handwritten record?
A. Yes.
Q. Now, what I want to do is walk through here and get down who's filling out what.
At the top lines up through blood pressure and weight, whose writing is that?
A. That's the medical assistant who basically bring him into the office.
Q. So they bring him in, they get a blood pressure, they weigh him and they note why he's there?
A. That's correct.
Q. And the reason Mr. Martin was there on February 6th, the reason she wrote down is he needed to get clearance to go back to work, he wanted to go back to work and you needed to clear him?
A. That's correct.
Q. Now, below that, is the rest of the writing on that page yours?
A. Yes.
Q. And the checkmarks and circles, are those yours as well?
A. Yes.

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Q. Why don't you just read me from top to bottom all of the writing. I don't need you to go over the checkmarks but just the written words.
A. No radiation; no chemo; rectal cancer.
Go to the bottom now. No lymph nodes; metastasis negative; stage of the tumor is T3; blood test negative; rectal cancer post resection; no colostomy; followup in three months.
Q. Let's walk back through this. Why did you find it significant to note no radiation, no chemotherapy at the top or was that significant to you?
A. It was.
Q. Why?
A. Because normally for rectal cancer, we give chemotherapy and radiation.
Q. What is your understanding as to why Mr. Martin did not receive radiation or chemotherapy?
A. That's basically my concern about that, that he did not get radiation and did not get any chemo, and that's the reason you see it in there, and that is the reason I told him, when you go again -- I mean, did they tell you why they didn't

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give chemo or radiation, and basically, I mean, you send to big university, normally that's what they would give, but he was still maintaining this and I did not really want to step on anyone's toes, but he told me that, they didn't give me any radiation neither chemotherapy.
Q. Did you ever call Dr. Fazio and ask him why he wasn't recommending any chemo or radiation for Mr. Martin?
A. No, I did not call.
Q. Back in February of 2006, was it your opinion that Mr. Martin with a T3 tumor should have had radiation and/or chemotherapy?
A. Yes.
Q. Today in 2008, do you still believe that Mr. Martin should have had radiation and chemotherapy in 2006?
A. Before surgery or after surgery?
Q. After surgery.
A. Normally, we give the radiation before surgery, so radiation usually is given before surgery.
Q. To shrink the tumor?
A. To shrink the tumor before you take it

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out, so that's basically what we do for rectal cancer.
Q. How about adjuvant chemotherapy, do you think he should have had that?
A. That's what I would -- yes.
Q. And do you believe the standard of care required that he be given adjuvant chemotherapy after a resection of a T3 tumor?
MR. ROBINSON: Let me just interpose an objection because he's not an oncologist. I understand you're asking obviously from his prospective as a gastroenterologist, just note the objection.
MR. WILT: Fair enough.
Q. You can answer.
A. Yes.
Q. The pathology of this tumor is in your file, the pathology that came back from CCF. I've seen those records in your file.
A. Yes.
Q. Is there anything specific about the pathophysiology of Mr. Martin's tumor that makes you believe he required adjuvant chemotherapy other than just the fact that it's a T3?

IN THE CIRCUIT COURT OF KANAWHA COUNTY
WEST VIRGINIA

AMOS MARTIN and
TAMMY MARTIN, his spouse,

Plaintiffs,

v. CIVIL ACTION NO. 08-C-1249
Judge James C. Stucky

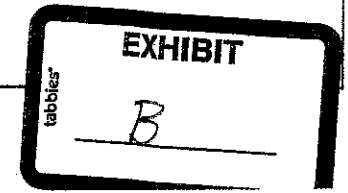
BASSAM HAFFAR, M.D.,

Defendant.

The deposition of **NARENDER JOGENPALLY** was taken under the West Virginia Rules of Civil Procedure in the above-entitled action before Karon L. Vorholt, a Certified Court Reporter and Notary Public within and for the State of West Virginia, on the 20th day of March 2009, commencing at 1:31 p.m., at his offices located at 401 Division Street, South Charleston, West Virginia, pursuant to notice.

Karon L. Vorholt, CCR

DeMuth Court Reporting, L.L.C.
Post Office Box 701
Dunbar, West Virginia 25064
304.766.8708



SHEET 12 PAGE 42

A I wanted to get back -- I don't know that I looked at it in the past. I don't remember at all.
Q But you -- you anticipated my --
A Right.
Q -- next question.
A Right.
Q In looking at that, you would agree that it shows that -- and I may have to take that away from you, just to read this into the record, if I may.
A Uh-huh.
Q But it notes that there's an indeterminate sub-centimeter nodules in the left apex and right lower lobe. They're talking about his lung.
Possibly non-calcified granulomata. A follow-up examine in four to six months may be obtained to assess stability and/or significance.
And that it also notes near the bottom of the report, limited views of the upper abdomen demonstrate at least two sub-centimeter hypodense lesions in the liver, which are too small to

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characterize adequately.
Did I read those correctly from those reports?
A That's correct.
MR. ROBINSON: In treating a patient like Mr. Martin who has rectal cancer and was at the Cleveland Clinic for resection, and having that information through a CT scan, would that prompt you to follow up with these hypo dense lesions in the liver and the lung nodules --
MR. WILT: Objection.
MR. ROBINSON: -- at some point during the course of your treatment?
MR. WILT: Objection.
THE WITNESS: With the CT scan, yes. But they were doing for some pulmonary embolism, I guess.
MR. ROBINSON: Right.
THE WITNESS: They did the CT scan for pulmonary embolism. So.
BY MR. ROBINSON:
Q But you would agree that if you're treating a patient, particularly one who has

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rectal cancer, and despite the fact you may be trying to rule in or rule out a pulmonary embolism, as a physician treating a patient with this type of condition and seeing these types of findings, would that raise your index of suspicion for metastatic disease?
MR. WILT: Objection.
THE WITNESS: Yes.
BY MR. ROBINSON:
Q Do you think it would be below the standard of care to fail to follow up on that type of CT scan if you're treating a patient through October of 2005 into May of 2006?
MR. WILT: Objection.
THE WITNESS: I would expect them to follow up with a CT scan. That's all I can say.
BY MR. ROBINSON:
Q And I take it from that comment that in your practice and experience it is necessary to follow up on a patient with rectal cancer because we know that it spreads first to the lung --
A Most common.
Q Most commonly to the lung, and then to

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the liver. Correct?
A Yes.
Q And you would expect physicians at the Cleveland Clinic to follow through with some kind of examination or radiographic studies for follow up on that, do you not?
A Yes. Someone has to be, yes.
MR. WILT: Objection.
THE WITNESS: Someone has to be. Someone has to have it -- if -- just the mere recommendation based on this, yes.
BY MR. ROBINSON:
Q And you would agree it would be a deviation from the standard of care not to do that, correct?
MR. WILT: Objection.
THE WITNESS: We expect somebody to follow up on this, yes.
MR. ROBINSON: Thank you.
BY MR. ROBINSON:
Q You would expect there would be an oncologist at the Cleveland Clinic that could be consulted for this, correct?

SHEET 10 PAGE 34

all we can think of.
Q How did he respond to the chemotherapy regimen you prescribed?
A What's that?
Q How did Mr. Martin respond to the chemotherapy regimen?
A I would say exceptionally good.
Q Why do you say that?
A Because, you know, his tumor appears to be chemo sensitive. We used two types of regimen for the regimen used that continued to respond.
Q Would you agree that greater than three tumors in the liver is extensive disease?
A Yes.
Q I want to refer first, Doctor, to an October 29, 2007 CT. We talked about that a bit. Can you find that there? If you can't, I have a better copy that I showed you.
A Okay.
Q Just look there. And again it shows progression of his disease from the July 31, 2006 CT scan, correct?
A Yeah, based on the report. Yes.

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Q And in fact I think it says that there are numerous lesions seen throughout the liver.
A Uh-huh.
Q And that three were placed most in the liver and no significant increase in size and number as compared with patient's previous examinations. They are consistent with metastatic disease. Is that correct?
A Correct.
Q And you started this chemotherapy regimen I think in December of 2007; is that correct?
A Yes. December 12th.
Q December 12th.
A Yes.
Q The next CT scan I noted -- and I wanted to ask you some questions about this because it was the only CT I saw that was outside of this facility. It was at CAMC.
A Okay. Which one is that?
Q This is one that was interpreted by Dr. Leef on March 18, 2008.
A Okay. I see that. The chest or the

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abdomen?
Q Do you have that in front of you, Doctor?
A Is it the chest or the CT abdomen? Which one is it? Or both of them?
Q Yeah, both.
A Okay.
Q Was there a reason Mr. Martin was sent to CAMC for that?
A That is kind of accidental. Umh, by the nurses. Usually routinely what we do, we ask the patient where original CT scan was done. So we send to the same place for the comparison.
Q Right.
A Somehow, I don't know why this has happened. And we got into trouble with that. Because we're getting a comparison -- we had a tough time getting a comparison for that.
Q That's what I noted, because in looking at your office note, I believe you said there was no comparison study that able to be done.
A That's right.
Q It's an outside facility.

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A Correct.
Q It wasn't in Saint Francis or at Thomas.
A Correct.
Q So --
A Pathologies weren't to be -- as opposed to when we see original CT scan done at CAMC, we send them to CAMC for the follow-up CT scan.
Q All right.
A So that's -- you know the CT scan, whatever the scan done before the treatment, then we wanted a follow-up CT scan the same facility --
Q I understand.
A -- whether it be at the institution or it is a private CT scan setting up -- set up.
Q And in looking at Dr. Leef's study he noted initially that he had no old studies for comparison --
A That's --
Q -- correct?
A -- correct?
Q And he looks at the chest and sees a questionable small nodule on the right upper lobe. And also two small nodules in the right middle and

EXHIBIT
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Original Transcript

IN THE CIRCUIT COURT
OF KANAWHA COUNTY,
WEST VIRGINIA

AMOS MARTIN AND TAMMY MARTIN, HIS SPOUSE

Plaintiffs

v.

BASSAM HAFFAR, M.D.

Defendant

CIVIL ACTION

NO. 08-C-1249

~~~~~~~~~~~~~~~~~~~~~~~~~~~~~~~~~~~~

DEPOSITION OF

DANIEL LAHERU, M.D.

Tuesday, March 24, 2009
10:54 A.M.

1650 Orleans Street, Suite 3M42
Baltimore, MD 21231

Reported by: Kathleen R. Turk, RPR-RMR

Toll Free: 800.752.8979
Facsimile: 804.225.9768

Suite 1130
901 East Byrd Street
Richmond, VA 23219
www.esquiresolutions.com
~~~~~~~~~~~~~~~~~~~~~~~~~~~~~~~~~~~~

A -- if you tell me that --

Q -- if this is -- if this is from the Cleveland Clinic and that Mr. Martin is a patient on May 2, 2006, and they have a prior CT scan that shows questionable abnormalities in his liver and lungs and a CEA level of 4.4, if you were treating Mr. Martin, you would have ordered a CT scan at this point, would you not?

A Yes, I would.

Q And the standard of care would require that, particularly in light of this CEA level, which is 4.4, doesn't it?

A I would say that, that a marker such as this would, would make me consider a CT scan within, within a shorter period of time, that would be correct.

Q And you would be deviating from the standard of care if you had this CEA level and a patient who is at this point seven months out of surgery, and if you didn't order the CT scan, you'd be deviating from the standard of care,

WEST VIRGINIA:

IN THE CIRCUIT COURT OF KANAWHA COUNTY

AMOS MARTIN and TAMMY MARTIN, his spouse,	)	
Plaintiffs,	)	
v.	)	No. 08-C-1249
BASSAM HAFFAR, MD,	)	
Defendant.	)	

DEPOSITION UPON ORAL EXAMINATION OF

JAMES STARK, MD

TAKEN ON BEHALF OF THE PLAINTIFFS

Suffolk, VIRGINIA

March 31, 2009

Reported by: Kerry Zahn, RMR-CRR

BY MR. ROBINSON:

Q. Dr. Stark, with respect to the Cleveland Clinic, you have previously testified that you believe that their failure to follow-up on the CT scan of October 13, 2005, along with the increasing CEA levels from January and May of 2006 were deviations from the standard of care; correct?

A. Yes.

Q. Would it likewise be reasonable to assume that physicians at the Cleveland Clinic attending to Mr. Martin in that time frame, had they met the standard of care, would have ordered a CT scan of his liver and lungs to follow-up on those organs systems?

A. Yes.

Q. Had they done that in -- some time frame between April and May of 2006, do you believe, based on the information you have reviewed thus far in this case, that the CT scans at the Cleveland Clinic -- of the liver -- would have shown signs of metastatic disease as seen on the July 31, 2006, CT scan?

A. Yes.

Q. And is it reasonable to assume that had a CT scan been done at the Cleveland Clinic during that time frame, that the physicians would have

referred Mr. Martin for oncologic treatment at the clinic?

A. Or somewhere, yes.

Q. Or some other facility; correct?

A. Yes, closer to home, or if they wanted to do it there or he wanted to stay there, yes.

Q. The 2007 CT scan report that Dr. Haffar sent to Dr. Jogenpally has reference to the -- to the July 2006 CT scan; does it not?

A. Yes.

Q. And would it be -- it's clear from review of that CT scan report from October of 2007 that there's a comparison study being done to the July 31, 2006 report; correct?

A. Yes.

Q. I have not received Dr. Jogenpally's deposition transcript yet, but, according to him, he is able to access both the reports and the actual CT studies at St. Francis and Thomas Memorial Hospitals. I will represent that to you; okay?

A. Fine.

Q. In that capacity, as a physician who is working on hospital staff, it would be reasonable to assume that if Dr. Jogenpally received the 2007 CT scan, he easily could have referenced the 2006 report

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

AMOS MARTIN and
TAMMY MARTIN, his spouse,

Plaintiffs,

v. Civil Action No. 08-C-1249
(The Honorable James C. Stucky)

BASSAM HAFFAR, M.D.,

Defendant.

* *

DEFENDANT'S MOTION FOR LEAVE
TO FILE THIRD PARTY COMPLAINT
& DEFENDANT'S MOTION
FOR CONTINUANCE OF TRIAL

Wednesday, April 8th, 2009

* *

The following is a transcript of a the proceedings held on April 8th, 2009, beginning at 9:09 a.m. before the Honorable James C. Stucky, Judge of the Circuit Court of Kanawha County, 13th Circuit, West Virginia, and transcribed by Karen D. King, Certified Court Reporter and Notary Public in and for the State of West Virginia, pursuant to written agreement for the purposes of the above-styled civil action.

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for a leave to file a third party complaint in October or November, though, I think it's even moot that the trial date would not have been affected.

Because, if you think about it, if I would have filed that in October or November, we wouldn't have gotten the Cleveland Clinic into the case until at least December, and I think the trial date would have been put in jeopardy.

My understanding is that we're twelfth or thirteenth on the docket as it is.

THE COURT: Probably in jeopardy as it is.

MR. ROBINSON: Well, I talked to Sherry yesterday, and I called Don Morris last week, and Don said that he's got eight felony cases and said, "I can't -- I know that a few of them are pleading, but I don't know if all of them will plead."

And Sherry, your secretary, also told me yesterday that Bill Murray has a case ahead of us that Bill wants to get tried, because it's an older civil case, and he says that it's ready to go, and it's ready to be tried.

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

AMOS MARTIN AND TAMMY MARTIN, HIS SPOUSE,

Petitioners,

v. **No. 090630**

THE HONORABLE JAMES STUCKY,
Judge of the Circuit Court of Kanawha County,
West Virginia, and BASSAM HAFFAR, M.D.,

RESPONDENTS.

CERTIFICATE OF SERVICE

I, Mark A. Robinson, do hereby certify that I have served the foregoing ***"RESPONSE OF BASSAM HAFFAR, M.D. TO PETITIONERS' REQUEST FOR WRIT OF PROHIBITION"*** upon the following counsel of record via hand delivery, this 11th day of May, 2009, addressed as follows:

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